Supreme Court, U.S.
FILED
JUN 01 1993
OFFICE OF THE CLERK

(2)

No. 92-1650

In the Supreme Court of the United States

OCTOBER TERM, 1992

CENTURY CENTRE PARTNERS, LTD., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J.T. BYRNE
General Counsel

ANN S. DUROSS
Assistant General Counsel

ROBERT D. MCGILLICUDDY
MARIA BEATRICE VALDEZ
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

BEST AVAILABLE COPY

13pp

QUESTION PRESENTED

Whether this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), applies to an asset held by the Federal Deposit Insurance Corporation (FDIC) as to which the FDIC is not a holder in due course.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bell & Murphy and Associates v. *InterFirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir. 1990)	8
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	4, 7
FDIC v. *Allen*, 801 F.2d 863 (6th Cir. 1986)	8
FDIC v. *Bank of San Francisco*, 817 F.2d 1395 (9th Cir. 1987)	7
FDIC v. *Galloway*, 856 F.2d 112 (10th Cir. 1988)	8
FDIC v. *Gulf Life Ins. Co.*, 737 F.2d 1513 (11th Cir. 1984)	8
FDIC v. *McCullough*, 911 F.2d 593 (11th Cir. 1990)	6
FDIC v. *P.L.M. Int'l, Inc.*, 834 F.2d 248 (1st Cir. 1987)	7
FDIC v. *Venture Contractors Inc.*, 825 F.2d 143 (7th Cir. 1987)	8
FDIC v. *Waldron*, 630 F.2d 239 (4th Cir. 1980)	8
FDIC v. *Wood*, 758 F.2d 156 (6th Cir. 1985)	8
Gunter v. *Hutcheson*, 674 F.2d 862 (11th Cir.), cert. denied, 459 U.S. 826 (1982)	8, 9
Howell v. *Continental Craft Corp.*, 655 F.2d 743 (7th Cir. 1981)	7-8
Langley v. *FDIC*, 484 U.S. 86 (1987)	5, 6
North Arkansas Medical Center v. *Barrett*, 962 F.2d 780 (8th Cir. 1992)	6, 8
Resolution Trust Corporation v. *Montross*, 944 F.2d 227 (5th Cir. 1991)	7
Public Loan Co. v. *FDIC*, 803 F.2d 82 (3d Cir. 1986)	8

Statutes: Page

Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 232:
§ 215, 103 Stat. 252 3
§ 217(4), 103 Stat. 254 6
12 U.S.C. 1441a(b)(4)(A) (Supp. III 1991) 7
12 U.S.C. 1821a(a)(1) (Supp. III 1991) 3
12 U.S.C. 1821a(a)(2)(A) (Supp. III 1991) 3
12 U.S.C. 1821a(a)(4) (Supp. III 1991) 6
12 U.S.C. 1823(e) 5, 6, 7, 8
12 U.S.C. 1823(e) (Supp. III 1991) 4, 5, 6
U.C.C. § 3-104(1) 8
U.C.C. § 3-302 8

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1650

CENTURY CENTRE PARTNERS, LTD., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-16) is reported at 969 F.2d 835. The opinions of the district court (Pet. App. 30-43) and the bankruptcy court (Pet. App. 44-50) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1992. A petition for rehearing was denied on January 8, 1993. The petition for a writ of certiorari was filed on April 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. According to petitioner's allegations in the lower courts,[1] Sunbelt Savings Association of Texas ("Old Sunbelt") purchased a real estate development in Los Angeles—the Centroplex—through a wholly owned subsidiary. When Old Sunbelt's independent auditors advised Old Sunbelt that the investment had caused Old Sunbelt to be undercapitalized, Old Sunbelt entered into a number of transactions designed to satisfy the auditors that its interest in the property was no longer an equity interest, but was instead that of a lender. At one stage, the property was conveyed to petitioner (Century Centre Partners, Ltd.) which at that time was controlled by Old Sunbelt and its officers. See Pet. App. 7-8.

Later, a controlling interest in petitioner was conveyed to certain entities organized by a third party, American Residential Properties. As part of those transactions, petitioner executed three promissory notes payable to Old Sunbelt in a total amount of approximately $278 million. Petitioner's obligation to repay those notes was secured by a lien on the real property as well as pledges of various partnership interests in petitioner. See Pet. App. 8-10.

When the proceeds of the properties owned by petitioner were insufficient to make the payments due on the debt owed to Old Sunbelt, petitioner defaulted on that debt. After negotiations with Old Sunbelt were unsuccessful, petitioner sought protection

---

[1] The lower courts disposed of this case by granting the FDIC's motion for summary judgment. Accordingly, for purposes of the petition, the facts are set forth as alleged by petitioner in the bankruptcy court. See Pet. App. 7.

under the Bankruptcy Code. At that time, it owed about $160 million on the three notes. See Pet. App. 10-11.

2. In August of 1988, the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for Old Sunbelt. Acting as receiver, FSLIC transferred the assets of Old Sunbelt to a newly formed entity named Sunbelt Savings, F.S.B. (New Sunbelt). New Sunbelt then transferred the notes in question here to FSLIC acting in its corporate capacity. Pursuant to Section 215 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73 (FIRREA), 103 Stat. 252 (codified at 12 U.S.C. 1821a(a)(2)(A) (Supp. III 1991)), those notes were transferred to the FSLIC Resolution Fund. The Federal Deposit Insurance Corporation (FDIC) manages that Fund under 12 U.S.C. 1821a(a)(1) (Supp. III 1991). See Pet. App. 11.

3. On March 26, 1990, petitioner filed an adversary complaint in the bankruptcy court against the FDIC asserting four claims for relief. The first three claims generally sought to avoid payment of the notes, by seeking (1) reclassification of FDIC's secured claims as equity interests; (2) equitable subordination of FDIC's claims, and transfer of the FDIC's liens to the debtor's estate; or (3) turnover to the estate of payments made to the FDIC and its predecessors during the pendency of the bankruptcy case.[2] Petitioner supported those claims by arguing

[2] The fourth claim sought damages for breach of the covenant of good faith and fair dealing and for breach of fiduciary duty. That claim is pending in the trial court and hence is not involved in the petition. See Pet. App. 6-7, 11.

that (a) it entered into the transaction in reliance on misrepresentations made by representatives of Old Sunbelt about the value and profitability of Centroplex, and (b) Old Sunbelt effectively retained control of petitioner even after the conveyances and thus should be treated as an equity owner, rather than as a creditor. The bankruptcy court granted summary judgment to the FDIC on the first three claims. Pet. App. 44-50. The court explained that the "alleged misrepresentations and conduct of Old Sunbelt constitute an 'agreement' within the meaning of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942)." Pet. App. 49.

4. The district court affirmed. Pet. App. 30-43. The court noted that "the *D'Oench, Duhme* doctrine has repeatedly been applied to protect the FDIC from claims or affirmative defenses based on fraud," *id.* at 40, and concluded that the same rule should apply here, *id.* at 42-43.

5. The court of appeals affirmed. Pet. App. 3-16.[3] The court first stated that 12 U.S.C. 1823(e) (Supp. III 1991), which reinforces the common-law rule articulated in *D'Oench, Duhme*, did not bar petitioner's claim, because that statute applies only to assets acquired by the FDIC "as security for a loan or by purchase or as receiver." Pet. App. 13. In the court's view, that provision did not extend to FDIC's acquisition of the notes as manager of the FSLIC Resolution Fund. *Ibid.*

---

[3] The court of appeals concluded that the case was sufficiently final for appellate jurisdiction, even though the fourth claim remained pending in the bankruptcy court. Pet. App. 12.

The court went on to rule, however, that the common-law rule set forth in *D'Oench, Duhme* barred petitioner's claims. Pet. App. 13-14. The court noted that this Court's decision in *Langley* v. *FDIC*, 484 U.S. 86 (1987), had made it clear that both *D'Oench, Duhme* and Section 1823(e) bar claims that notes are unenforceable because of misrepresentations that allegedly induced a borrower to execute a promissory note. Pet. App. 13-14. The court explained:

> If Old Sunbelt did make fraudulent promises through [petitioner], there would be no way the bank examiners could detect the fraud from examination of the loan file and the [n]otes. The bank examiners would assume that the [n]otes were assets of the bank. The bank examiners could not know that the [n]otes were subject to conditions they could not know.

Pet. App. 14.

ARGUMENT

Petitioner argues (Pet. 15-20) that *D'Oench, Duhme* protects the FDIC only when it is a holder in due course.

1. At the outset, the question argued by petitioner fails because it rests on the premise that the FDIC can not rely on 12 U.S.C. 1823(e) (Supp. III 1991) when it acts as Manager of the FSLIC Resolution Fund.[4] That premise is incorrect. The court of appeals' contrary ruling failed to take account of Congress's unequivocal extension of all the FDIC's powers

[4] Petitioner's argument is unclear, but it appears to contend that *D'Oench, Duhme* cannot protect the FDIC in this case *because* Section 1823(e) does not apply. See Pet. 17, 19.

(including its powers under Section 1823(e)) to the FDIC acting as manager of the FSLIC Resolution Fund.[5] Under 12 U.S.C. 1821a(a)(4) (Supp. III 1991), "[e]ffective [the date the FSLIC Resolution Fund was established], the [FDIC] shall have all rights, powers and duties to carry out the [FDIC]'s duties with respect to the assets and liabilities of the FSLIC Resolution Fund that the [FDIC] otherwise has under this chapter."[6] Accordingly, the court of appeals erred in ruling that Section 1823(e) did not apply in this case.[7] Because Section 1823(e) does apply, petitioner's claims would fail even if petitioner were correct in arguing that *D'Oench, Duhme* does not apply when the FDIC is not a holder in due course.

2. In any event, petitioner offers no substantial basis for concluding that the common-law rule established in *D'Oench, Duhme* should be tied to the FDIC's holder in due course status. In *D'Oench, Duhme*, this Court refused to allow a borrower sued by the FDIC on a note it acquired as receiver of a

---

[5] Section 1823(e) was amended in 1989 by Section 217(4) of FIRREA, 103 Stat. 254, but the FDIC would have prevailed in this case under either version. Compare 12 U.S.C. 1823(e) (1988) with 12 U.S.C. 1823(e) (Supp. III 1991); see also *Langley* v. *FDIC*, 484 U.S. 86 (1987) (interpreting old version of Section 1823(e)).

[6] Sections 1821a(a)(4) and 1823(e) both appear in Chapter 16 of Title 12.

[7] We note that other courts of appeals have concluded that the FDIC as manager of the FSLIC Resolution Fund is entitled to rely on the protections of Section 1823(e), even without considering Section 1821a(a)(4). See, *e.g.*, *North Arkansas Medical Center* v. *Barrett*, 962 F.2d 780, 784-785 (8th Cir. 1992); *FDIC* v. *McCullough*, 911 F.2d 593, 598-599 (11th Cir. 1990).

failed bank to assert as a defense the claim that the note was given "with the understanding that no suit would be brought thereon." 315 U.S. at 456. Because that rule rests on the need of regulators to determine the "genuineness of assets ostensibly held by a bank," *ibid.*, the contours of its application should depend on the opportunity for deception of regulators, rather than the niceties of holder in due course status. Indeed, one of the claims at issue in *D'Oench, Duhme* itself was a claim that the FDIC was not a holder in due course under applicable state law. 315 U.S. at 456. Accordingly, there is no basis for concluding that *D'Oench, Duhme* applies only when the agency seeking its protection is a holder in due course. See, *e.g.*, *Resolution Trust Corporation* v. *Montross*, 944 F.2d 227, 228-229 (5th Cir. 1991) (en banc) (even if Resolution Trust Corporation is not a holder in due course, "personal defenses * * * must, of course, be based on documents of the savings institution * * * and not upon secret agreements unenforceable under *D'Oench, Duhme*")[8]; see also *FDIC* v. *P.L.M. Int'l, Inc.*, 834 F.2d 248, 254 (1st Cir. 1987) (noting, in a case involving 12 U.S.C. 1823(e), that "the necessity for speed has led the majority of courts of appeals to reject the idea of treating negotiable and nonnegotiable instruments differently").[9]

---

[8] The Resolution Trust Corporation has "the same powers and rights to carry out its duties * * * as the Federal Deposit Insurance Corporation has under sections 1821, 1822, and 1823 of this title." 12 U.S.C. 1441a(b)(4)(A) (Supp. III 1991).

[9] Other courts, without discussion, have applied *D'Oench, Duhme* to nonnegotiable documents. See *FDIC* v. *Bank of San Francisco*, 817 F.2d 1395, 1398-1400 (9th Cir. 1987); *Howell* v.

The court of appeals decisions on which petitioner relies (Pet. 15) do not address that question. *Bell & Murphy and Associates* v. *InterFirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir. 1990), stated only that the FDIC could rely on *D'Oench, Duhme* when it acts as a receiver; it expressed no opinion regarding circumstances when the FDIC could not rely on *D'Oench, Duhme*. *Id.* at 753. *FDIC* v. *Wood*, 758 F.2d 156, 158-159 (6th Cir. 1985), states a number of reasons why the FDIC frequently might not be a holder in due course, but goes on to adopt a federal common law rule (independent of *D'Oench, Duhme*) that protects the FDIC even in the absence of that status. *Id.* at 160-162. Finally, the cited passage of *Gunter* v. *Hutcheson*, 674 F.2d 862, 867 (11th Cir.), cert. denied, 459

Continental Credit Corp., 655 F.2d 743, 745-748 (7th Cir. 1981). Those decisions are inconsistent with petitioner's argument because holder in due course status generally is available under state law only with respect to negotiable instruments, see UCC §§ 3-104(1), 3-302, and because those decisions rely on *D'Oench, Duhme* rather than a federal common law rule granting FDIC holder in due course status notwithstanding state law (compare, *e.g.*, *FDIC* v. *Wood*, 758 F.2d 156, 160-162 (6th Cir. 1985) (granting FDIC holder in due course rights as a matter of federal common law)). For similar decisions regarding Section 1823(e), see, *e.g.*, *Public Loan Co.* v. *FDIC*, 803 F.2d 82, 84-85 (3d Cir. 1986) (guaranty agreement); *FDIC* v. *Waldron*, 630 F.2d 239, 241 (4th Cir. 1980) (guaranty agreement); *FDIC* v. *Allen*, 801 F.2d 863, 865 (6th Cir. 1986) (partnership agreement); *FDIC* v. *Venture Contractors Inc.*, 825 F.2d 143, 150 (7th Cir. 1987) (guaranty agreement); *North Arkansas Medical Center* v. *Barrett*, 962 F.2d 780, 786-789 (8th Cir. 1992) (collateral pledge agreement); *FDIC* v. *Galloway*, 856 F.2d 112, 116 (10th Cir. 1988) (guaranty agreement); *FDIC* v. *Gulf Life Insurance Company*, 737 F.2d 1513, 1516-1517 (11th Cir. 1984) (insurance contract).

U.S. 826 (1982), deals with Section 1823(e), rather than *D'Oench, Duhme*; subsequent portions of the opinion affirm the broad applicability of *D'Oench, Duhme*. 674 F.2d at 868-873.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

ALFRED J.T. BYRNE
General Counsel

ANN S. DUROSS
Assistant General Counsel

ROBERT D. MCGILICUDDY
MARIA BEATRICE VALDEZ
Counsel
Federal Deposit Insurance Corporation

JUNE 1993